## UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF IOWA WESTERN DIVISION

XCENTRIC VENTURES, LLC, an Arizona limited liability company; and ED

No. 15-CV-4008-DEO

MAGEDSON, an individual,

STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL

SUMMARY JUDGMENT

Plaintiffs,

VS.

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**BEN SMITH**, in his individual capacity as Sac County Attorney,

:

Defendant.

Pursuant to Rule 56, Fed. R. Civ. P., Plaintiffs Xcentric Ventures, LLC ("Xcentric") and Ed Magedson submit the following statement of undisputed material facts in support of their Motion for Summary Judgment Re Affirmative Defense of Qualified Immunity:

- Defendant Ben Smith was the elected County Attorney of Sac County in the State of Iowa at all times relevant to the conduct alleged in the Complaint. See Compl. at ¶ 19;
   Ans. at ¶ 10.
- Smith applied for and obtained a search warrant for email accounts for Westerned@aol.com. See Documents re Search Warrant for AOL Inc Accounts for Westerned@aol.com dated July 1, 2014 ("AOL Search Warrant"), attached as Exhibit
   1.
- 3. "In issuing the search warrant, the [magistrate judge] relied upon the sworn testimony of Sac County Attorney Ben Smith" and the statements in the application submitted by Smith. *See* Ex. 1 at p. 3 (Endorsement on Search Warrant dated July 1, 2014).

- 4. In connection with issuing the search warrant for AOL Inc., the District Court entered an Order directed to "SCA BEN SMITH" that required Smith "to prepare a written inventory of the property / information seized and to return this warrant together with the written inventory and the seized property / information before me shortly after receiving the same from AOL INC., to be sealed pursuant to the accompanying order sealing search warrant records[.] See Ex. 1 at p. 4 (Search Warrant: SAC County Attorney Ben Smith and / or Any Peace Officer in the State of Iowa dated July 1, 2014 ("Order to Smith")). The Order to Smith "FURTHER ORDERED that the content of messages / items provided by AOL Inc. . . . . that are not seized . . . SHALL BE KEPT CONFIDENTIAL and the Sac County Attorney's Office SHALL DESTROY copies of those items not relevant / seized pursuant to Section II of Attachment B[.]" Ex. 1 at p. 4.
- 5. Notwithstanding the order's directive to seal items relevant to the alleged crimes and keep confidential and destroy any message or item provided by AOL Inc. that did not "relate to the crimes alleged in the Affidavit," Ex. 1 at p. 4, Smith admittedly disclosed confidential records obtained pursuant to the AOL Search Warrant to John Brewington, Michael Roberts, and Scott Connelley. *See* Tr. of Prelim. Inj. Hearing dated May 1, 2015 (excerpt), attached as **Exhibit 2**, at 70:18-21, 71:16-72:20; *see also* Ex. 8 to May 1, 2015 Preliminary Injunction Hearing.
- 6. Smith applied for and caused a County Attorney Subpoena Duces Tecum to be issued to Bank of America, in connection with a purported criminal investigation, that compelled Bank of America to produce "All BANK OF AMERICA accounts belonging to / in the name XCENTRIC VENTURES / RIPOFF REPORT" and

"MARTIN & SILVA MADGESON TRUST" along with various other entities. See

Cnty. Attorney Subpoena Duces Tecum Documents to Bank of America ("Bank of

America Subpoena"), attached as **Exhibit 3**, at pp. 1, 9, 11.

7. Smith submitted to the District Court a proposed Order for County Attorney Subpoena

Duces Tecum to Issue, which he presumably drafted, that expressly "ORDERED [that]

the information gathered under said subpoena shall be kept confidential and no further

dissemination of said information shall be permitted until further ordered of this Court

[sic]." Ex. 3 at p. 5

8. Smith admittedly disclosed Xcentric's confidential financial information, which he

obtained pursuant to the Bank of America Subpoena, to John "Brewington, [Michael]

Roberts, and possibly Scott Connelley." See Tr. Dated June 7, 2016 (Depo. of Ben

Smith) (excerpt), attached as Exhibit 4, at 182:20-183:1. Smith also admittedly

allowed John Brewington to download and review Xcentric's bank records, which he

obtained in response to the Bank of America Subpoena. Ex. 4 at 183:2-8; Ex. 2 at

105:19-22.

Dated January 13, 2017.

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## /s/ Maria Crimi Speth

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## **CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2017, I electronically filed this document with the Clerk of the Court using the ECF system which will serve it on the appropriate parties.

/s/Maria Crimi Speth